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APPENDIX A

March 15, 1995

Mr. Bruce Farmer
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102

RE:*Missouri Department of Corrections, et al. v. Joe Heaton, et al.*
Application No. A-667

Dear Mr. Farmer:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on March 15, 1995, extended the time to and including April 4, 1995.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By
/s/ Loretta S. Ruffin

Loretta S. Ruffin
Assistant Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-1517

Joe Heaton; Edward L. Stockwell; Natilee J. Crammer; Donald L. Daniels; Frank H. Parker, Jr.; Robert Smith; Robert D. Norris; Leon D. Maifield; Carmen D. Jenkins; Jerry Giboney; Hazel Elder; Linda F. Winingear; Tina M. Meder; Jack Meder, Sr.; Gary L. Kern; Barbara L. Dolezal; June Cornelius; C. F. Cornelius; Kenneth W. Bennette; Wade R. Beers; Edward Schmidt; Larry C. Jackson; Robert Intrery; Frances Connell; Haldon B. Delo; Moses L. Carbin, Jr.; John Carpenter; Joann Delo; John F. Dobe; Judy Howard; Anita J. Janes; Edward McNeil; Gilman C. Painter; Chester Sutton; John G. Swan; Robert L. Taylor; Roger D. Wheat; Donald G. Hagner; James Hagner; Richard M. Kirschner; Douglas Koenigsfeld; John L. Looten; Edward E. Matteson; C.R. McDonnell; Linda G. Rackers; Travis D. Watson; Clara J. Reed; Larry Mack; Larry Heuman; Donald Barton; Virgil Arnold; Thomas P. Riordan; Patrick Riordan; Gregory M. Lippold; Jerald L. Harrah; James F. Earhart; Corbett H. Fasching, II; Timothy S. Hays; John A. Larmer; Louis N. Mitchell; Anthony L. Patterson; Jackie L. Cobaugh; Gail W. Jackson; Wayne D. Hurley; Carl Hanes; Charlene L. Drake; Philip M. Daniels; Donna E. Long; Jane Richardson; Steve Richardson; Edward K. Marshall; Kay Ivy; Bill Arndt; Clyde J. Mann; Ron Nunnery; Carl W. Roberts; Betty C. Ponder; Etelka M. Van Winkle; Ruby Tyler; Michael S. Shrout; Dewey Ivy; Lawrence R. Kniser; Vestel M. Yates; John M. Hucke;

Wrick C. Essman; David Butcher; James E. Farrow; Edward L. Barron; David A. Fisher; Gerald W. Hobbs; Cedric Spain; Terry Snow; Freddie O. Freeman; Ronald Wainright; Parrish L. Ramey; Phillip A. Davis; Thomas R. Goodrich; Gary D. Baldwin; Donald W. Reinkemeyer; Stephen H. Goodwin; James L. Thompson; Dale E. Gibbs; Ralph L. Allen; Harold K. Jones; George A. Failing; Charles L. Bussio; Lawrence W. Mills; Roy Sunny Shoun; Sherrie Wohlgemuth; Larry Wohlgemuth; James B. Thompson; Laurel B. Beard; Marechal Koch; Elmer J. Winingar, III; Willis L. Brooks; Henry Vollmer; Joseph T. Woelich; John D. Shively; Rita F. Roney; Karen R. Pulliam; Richard W. Polk; Brenda J. Pierce; Brian Pettus; Clinton D. Lee; Donna K. Lacy; Jack L. Husk; Patricia Hardesty; Gary S. Gratton; William C. Ging; Darrell L. Faircloth; Steve Eaton; Floyd Michael Plymale; Troy A. Hurt; Sandra L. Hurt; Timothy W. Chronister; Robert L. Burden; Donald L. Beauchamp; Mary Susan Barton; Clifford R. Allen; Richard E. Middleton; Gary Cook; Daniel P. Engelke; Tracy Washington; Gary Anderson; Hershell Brooks; Joyce M. Gibbs; Billy Gene Tilley; Paul A. Merrill; Glenda L. Merrill; Charles R. Cowan; Daniel Dicus; Richard Skaggs; Morgan R. Warren; Gary G. Ellis; Billy Davis; Auldine E. Ferrell, Jr.; William H. Hathaway; Natalie Holland; Leonard J. Williams; Kenneth Brenneman; John C. Smith; Larry Wray; Michael L. Theberge, Sr.; Dwight Lawson; Lonnie E. Carpenter; Lamont Hamilton; Curtis A. Rifenberg; Robert A. Aders; Joyce Alexander; Ralph L. Allen; Melvin C. Autrey; Greer Baker; Rosemary K. Balles; William J. Barber; Angie D. Bartlett; Steven D. Battershell; Thomas D. Beaman; Major Bell; William A. Bell, Jr.; Sarah B. Berhorst; Gene A. Blount; Alma Borgmeyer; Lonnie R. Branch, Sr.; Johnny N. Brown; Stephen R. Brownlee; Joy L. Burns; Lenny C. Busby; James Carlock; Richard Cartmill; David Clare; Peggy Clare;

Mark D. Dalton; William R. Daugherty; Ralph F. Dill; Alvin F. Dunmer; Jesse C. Duncan; Hazel Elder; Lloyd D. Ewing; Annie B. Fowler; Catherine R. Friend; Harold K. Gan; Forrest G. Gerhart; Frank L. Gladfelder; Charles E. Golden; Tom Goodrich; Kenneth M. Grace; Cecil P. Graves; Glenn Gross; Geraldine Gyngard; Kenneth L. Harrison; Kevin M. Helton; Richard W. Hirschman, Jerry Hockersmith; Thomas Wesley Huber; Bill Humfeld; Edgar E. Hunt; Beatrice Kay Hunt-Barner; Valerie Hyatt; Kay Ivy; William F. Jacks; Helen Joyce Jacobs; Dennis Eugene Jones; James D. Jones; Robert Weavers; Michael D. Webb; Gladys Weir; Thomas H. Wells; Don Whitfield; Larry W. Whittle; Kenneth M. Wenell; Keith Wright,

Plaintiffs - Appellees,

v.

Dick D. Moore, Director of Department of Corrections for the State of Missouri; Department of Corrections for the State of Missouri,

Defendants - Appellants.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: September 13, 1994
Filed: December 21, 1994

Before HANSEN, Circuit Judge, FLOYD R. GIBSON, and HENLEY, Senior Circuit Judges.

HANSEN, Circuit Judge.

The defendants, the Department of Corrections for the State of Missouri (DOC) and Dick D. Moore, Director of the DOC, appeal the district court's[1] order granting summary judgment to the plaintiffs, who are DOC employees, on their claim that the defendants violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-216. The district court found that the defendants' policy requiring the plaintiffs to use compensatory leave time, accrued by them for performing overtime work, at particular times designated by the defendants violated the FLSA. The defendants contend that the district court erred in concluding that the DOC policy regulating the use of compensatory leave time violated the FLSA. We affirm.

I.

The relevant facts are not disputed. The FLSA allows state and local governments and agencies to provide their workers with compensatory time off for overtime work performed instead of cash overtime pay, if the employees agree to this arrangement either as part of a collective bargaining agreement or in some other agreement with the employer made before they start work. *See* 29 U.S.C. §§ 207(o)(1) & (2). All of the plaintiffs in this case agreed to accept compensatory time in lieu of cash paid overtime as a condition of their employment when they began working for the DOC. Indeed, it is a condition of employment for DOC employees.

The DOC regularly scheduled overtime work for correctional officers and credited those employees with an

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[1]The Honorable Fernando J. Gaitan, Jr., United States District Judge for the Western District of Missouri.

hour and a half of compensatory time for each hour of overtime worked, consistent with section 207(o)(1) of the FLSA. The DOC employment manual stated, consistent with 29 U.S.C. § 207(o)(3)(A), that a corrections officer would "be credited with federal compensatory time until that employee has worked 320 actual federal overtime hours which equals 480 hours of federal compensatory time . . . [and] shall be given overtime pay for time earned beyond the 480 hours." (App. at 147.) The manual also provided:

> Federal Overtime Control: Whenever any covered employee accrues one hundred twenty (120) hours of overtime, which converts to one hundred eighty (180) hours of compensatory time, the institution or office personnel representative shall immediately notify the chief administrative officer as well as the departmental personnel officer in central office. The chief administrative officer or their [sic] designees shall immediately meet with the employee and discuss a plan to reduce the number of overtime hours accrued by the employee. If departmental needs prevent giving such overtime off, the chief administrative officer shall review the employee's schedule every two weeks,

> and continuously endeavor to reduce the employee's accrued overtime.

(App. at 148.) In furtherance of the DOC's goal of keeping compensatory time balances at a minimum, the DOC also circulated a memo to correctional workers specifically stating its desire to reduce employee compensatory time balances. The memo stated that "all Officers with 100 or more hours of Comp Time, will submit a 1st and 2nd choice Comp time off request, for 40 Hours or more for the following Month" and that "[i]f a request is not received, Comp time off will be scheduled." (App. at 173.) In accordance with this policy, when corrections officers have failed to reduce voluntarily their compensatory time balances, the DOC has required the officers to take compensatory time off at times scheduled by the DOC, even when the officers have objected.

The plaintiffs filed this lawsuit challenging the DOC's policy of requiring involuntary use of compensatory time as a violation of the FLSA.[2] The defendants argued that the policy did not violate any provision of the FLSA and was consistent with the statutory rules on the use of compensatory time. The district court granted summary judgment for the plaintiffs after finding that the forced-use policy violates the FLSA. The defendants appeal.

III.

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[2]The plaintiffs raised a number of other issues that were decided by the district court but are not the subject of this appeal.

We review a district court order granting summary judgment de novo. *Clark v. Groose*, 36 F.3d 770, 772 (8th Cir. 1994). This case presents a question of first impression: whether a public employer violates the FLSA by unilaterally imposing a policy that forces employees, against their wishes, to use accrued compensatory time at times scheduled solely by the employer. The resolution of this question turns primarily on the construction of 29 U.S.C. § 207(o)(5), the only section of the FLSA to address the use of accrued compensatory time. Section 207(o)(5) provides:

> An employee of a public agency . . . (A) who has accrued compensatory time off . . . and (B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

The district court found that compensatory time is a "right" under the FLSA, and that section 207(o)(5) entitles employees to use their accrued compensatory time (which they have the "right" to receive) at their discretion, except when their requested use of the time will unduly disrupt the employer's operations. The district court concluded that the DOC's unilateral policy of forcing employees to use compensatory time when directed to do so by the DOC without an initiating request from the employee violated the

employees' rights under section 207(o)(5) to use their compensatory time at the employees' discretion.

The defendants argue that the district court erred in interpreting section 207(o)(5). They argue that because section 207(o)(5) addresses only employee requests to use compensatory time, the statute is silent on the particular question presented here -- whether the employer can force an employee to use compensatory time once the employee's compensatory time balance has reached a certain point. Thus, the defendants argue that the DOC's policy does not violate section 207(o)(5) because Congress did not specifically address the issue. The defendants also argue that the DOC policy is fully consistent with section 207(o)(5) because the policy's purpose is only to prevent undue disruption of the DOC's operation.

In view of the entire statutory regime regulating the accrual and use of compensatory time, we agree with the district court and conclude that the DOC policy is inconsistent with section 207(o)(5). The FLSA, as noted above, allows public agencies to provide compensatory time in lieu of cash overtime pay if an employee agrees to such an arrangement either through collective bargaining or some other agreement before starting employment. 29 U.S.C. § 207(o)(1) & (2). Employees are allowed to "bank" compensatory time in what amounts to an employee-owned savings account of compensatory time. The banked compensatory time essentially is the property of the employee.[3] We read section 207(o)(5), the only section

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[3]This is consistent with the Department of Labor regulations which describe compensatory time as a "right" the employee receives, 29 C.F.R. § 553.25(b), and which

addressing the method for using banked compensatory time, to be consistent with the understanding that the banked time belongs to the employee. Section 207(o)(5) specifically gives the employee the right of access to and control of the use of that banked time subject only to the employer's right to deny requested uses by the employee that would unduly disrupt the employer's operation. As the employee would have the right to spend the employee's cash overtime pay when and as the employee chose, so the employee should be allowed to spend the banked compensatory time as the employee chooses, subject only that the employee not "unduly disrupt" the public employer's operations in doing so.

In our view, section 207(o)(5) clearly allocates the relative rights of employees and employers to control the use of accrued compensatory time. An employee has the right to use the accrued time as the employee sees fit subject only to the employer's limited right to deny an employee's request if it would unduly disrupt the employer's operations. Congress has not provided the employer with any further right to unilaterally control or to force the employee's use of compensatory time. We take guidance here from the maxim of statutory construction *inclusio unius est exclusio alterius*. Under that principle of construction, "'[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.'" *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1312 (9th Cir. 1992) (quoting *Raleigh & Gaston Ry. v. Reid*, 80 U.S. 269, 270 (1871)). In other words, where

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require the employer to inform the employee "that compensatory time received may be preserved" by the employee, 29 C.F.R. § 553.23(c)(1)(ii).

Congress has specified in the statute the circumstances under which a public employer may exercise unilateral control over accrued compensatory time, other unilateral methods not provided for in the statute are not allowed under the statute. We conclude that Congress has limited the public employer's control over an employee's requested use of compensatory time only to situations where an employee's requested use of compensatory time would be "unduly disruptive" to the public employer's operations. Any further attempt by a public employer to unilaterally exercise authority over how the employee uses the employee's accrued compensatory time is inconsistent with section 207(o)(5).[4]

The defendants contend that the forced-use policy is simply an attempt to avoid future events that could be "unduly disruptive" to the work of the DOC and, therefore, the policy is wholly consistent with section 207(o)(5). The undue disruption that the defendants allege they are attempting to avoid is the potential of having to pay overtime wages to correctional officers who accrue more than 480 hours of compensatory time and of having to make large payments on sizeable unused compensatory time balances when employees leave the DOC. *See* 29 U.S.C.

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[4]The employees in this case agreed to take compensatory time in lieu of cash overtime pay with no further restrictions on the use of the compensatory time contained either in the employment agreements or otherwise. We take no position on section 207(o)(5)'s effect on any additional agreements between the employer and the employees which may limit the time and manner of the employees' use of compensatory time. Those issues are not presented by the record before us.

§ 207(o)(3)(A) (public safety workers accruing more than 480 hours of compensatory time must be paid overtime compensation); 29 U.S.C. § 207(o)(4) (on termination of employment public employer must pay for unused compensatory time). The defendants assert that keeping compensatory time balances low will avoid DOC budget problems brought on by the expense of paying overtime compensation and will help avoid scheduling problems that would arise in attempting to prevent employees who are near the 480-hour level from exceeding it.

We are not persuaded by the defendants' argument. Section 207(o)(5)'s "unduly disruptive" exception cannot help the defendants because that exception is not implicated in this case. The "unduly disruptive" exception comes into play only when an employee first requests to use his or her accrued compensatory time. The DOC's policy is not in any way linked to an employee's voluntary request to use compensatory time. Quite to the contrary, the policy forces employees either to make a request to use their time or to use their banked time when they do not want to do so. Simply stated, section 207(o)(5) gives public employers only the right to decline an employee's request to use compensatory time because the proposed use would be unduly disruptive, not the right to force an employee to make a request to use compensatory time in anticipation of some potential undue disruption later.

Moreover, the eventual payment of overtime compensation as mandated by the FLSA cannot be deemed "unduly disruptive" of the DOC's operation. Congress has expressly established as a matter of public policy that public employers must pay for overtime in cash to public safety employees, like the plaintiffs in this case, whose compensatory time balances have reached 480 hours and

must pay employees for unused compensatory time upon termination. 29 U.S.C. §§ 207(o)(3)(A) & (o)(4). We find that the prospect of having to comply in the future with a Congressionally enacted public policy initiative cannot be deemed to be "unduly disruptive" of the employer's operation. It is simply a law with which the defendants must comply. We also note that Congress expected some disruption of the employer's operation to occur as a result of an employee's decision to use compensatory time when the employee wants to do so. The employer may only deny an employee's request to use compensatory time when the proposed use would "unduly disrupt" the employer's operation. (emphasis added). Accordingly, we reject the defendants' argument that the DOC's forced-use policy is consistent with or supported in any way by section 207(o)(5).

The defendants have argued at length that if they cannot force employees to use their accumulated compensatory time at some point, they will have no way of controlling employees' compensatory time balances. Again, we must disagree. Employers retain the ability to control any such problem from the front end. Employers are free to schedule less overtime and/or hire more corrections officers to reduce the need for compensatory time. As we have previously observed, "[a] fundamental purpose of the Fair Labor Standards Act was to encourage employers to distribute work among a larger number of employees rather than to work employees overtime." *Marshall v. Hamburg Shirt Corp.*, 577 F.2d 444, 446 (8th Cir. 1978).

For the foregoing reasons, we affirm the district court's grant of summary judgment to the plaintiffs.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 91-0638-CV-W-2

JOE HEATON, et al.,

Plaintiffs

v.

DICK MOORE, et al.,

Defendants

ORDER

[Filed: Jan. 18, 1994]

Plaintiffs in this case are current or former employees of the Missouri Department of Corrections (DOC). Plaintiffs allege violations of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219. Specifically, plaintiffs claim in Count I that defendants wrongfully forced them to accept compensatory time in lieu of cash for overtime worked. In Count II, plaintiffs claim that defendants violated the FLSA by unilaterally assigning plaintiffs use of compensatory time and by failing to grant plaintiffs' requests for compensatory time when to do so would have caused no disruption to the agency.

Cross motions for summary judgment were filed by the parties. On July 8, 1993, this court issued an order which granted summary judgment in favor of defendants on Count I. Partial summary judgment was granted in favor of plaintiffs on Count II. The July 8 Order found that § 207 of the FLSA does not allow an employer to unilaterally determine when an employee may take compensatory time and hence summary judgment was granted in favor of plaintiffs on this claim.

The July 8 Order, however, denied summary judgment on the issue of whether the defendants failure to grant plaintiffs' requests for compensatory time violated the FLSA. This issue remains for trial.

Pending before this court is defendants' motion in limine to exclude evidence of certain denials of use of compensatory time and defendants' motion for reconsideration of this court's Order of September 13, 1993.

1. Defendants' Motion in Limine to Exclude Evidence of Certain Denials of Use of Compensatory Time

Defendants state that Interrogatory Number One of Defendants' Second Interrogatories, requested the identity of "each plaintiff who maintains that he or she was denied an opportunity to use compensatory time within a reasonable period after it was requested." (Sugg. in Supp. of Def.'s Mot. in Limine at 2). Plaintiffs responded to this interrogatory by listing seventeen individuals who were subsequently deposed by defendants. Defendants now move to have plaintiffs' evidence of denials of compensatory time limited at trial to these seventeen individuals. Defendants claim that they will be prejudiced

if plaintiffs are allowed to present evidence at trial of other claims.

The court agrees with defendants that they would suffer prejudice and be forced to defend against unknown claims if plaintiffs' evidence of denials of compensatory time is not limited to the seventeen individuals named in the answer to Interrogatory Number One. Consequently, upon a showing of good cause and there being no opposition by the plaintiffs, defendants motion in limine is granted.

2. Defendants' Motion for Reconsideration

This court's July 8, 1993 interpretation of § 207 of the FLSA is one of first impression and hence defendants moved to have this part of the July 8 order certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) or in the alternative certified as final pursuant to Fed.R.Civ.P. 54(b). Plaintiffs concurred with defendants' motion. This court's Order of September 13, 1993 denied certification for appeal under § 1292(b). The Order also provisionally denied certification under Rule 54(b).

The September 13 Order found that two of the three requirements for Rule 54(b) had been met: (1) multiple claims for relief and (2) final resolution of at least one claim. The Order found, however, that defendants had not sufficiently shown a danger of hardship or injustice which would result from the inability to obtain early review. Defendants alleged that delay would "result in the Department of Corrections being required to pay employees with more than 480 hours of accrued compensatory time cash wages for overtime worked." (Def.'s Mot. to Certify a Portion of July 8, 1993 Order for Appeal at 3.) The

September 13 Order noted that without more specific information, it was impossible to determine whether or not a hardship or injustice would result from failure to obtain early review.

Defendants have responded to the September 13 Order by setting forth the following arguments. The July 8 Order has prevented the DOC from requiring employees to use compensatory time. This has resulted in a rise in the compensatory time banks. Most of this increase in compensatory time has been accrued by corrections officers who have a high turnover rate. Because the DOC must pay cash for accrued compensatory time when an employee resigns or is terminated, this increase in the amount of compensatory time has resulted in greater amounts of money paid to employees upon separation from employment. Defendants claim that the DOC is already facing serious financial difficulties. Furthermore, defendants note that should this court's interpretation of § 207 be reversed by the Eighth Circuit, these cash payments cannot be recouped by the state.

The court finds that defendants have met the requirements for a showing of hardship or injustice from failure to obtain early review of this court's July 8 interpretation of § 207. Therefore, defendants' motion for certification as Part III(B)(1) of this court's July 8, 1993 Order as final pursuant to Rule 54(b) is granted. The court also finds that to obtain efficiency of a trial on all remaining issues in this case, a stay of the currently scheduled trial pending appeal is warranted.

Accordingly, it is ORDERED that:

(1) defendants' motion in limine to exclude evidence of certain denials of use of compensatory time is GRANTED;

(2) defendants' motion for reconsideration of this court's Order of September 13, 1993 is GRANTED;

(3) Part III(B)(1) of this court's Order of July 8, 1993 is certified as final pursuant to Fed.R.Civ.P. 54(b);

(4) the currently scheduled trial on the remaining issues in this case is stayed pending an appeal of Part III(B)(1) of this court's Order of July 8, 1993.

/s/ Fernando J. Gaitan, Jr.
Fernando J. Gaitan, Jr.
United States District Judge

Dated this 18 day of January, 1994.
Kansas City, Missouri

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 91-0638-CV-W-2

Joe D. Heaton, et al.,
Plaintiffs,

v.

Dick D. Moore, et al.,
Defendants.

ORDER

[Filed: July 8, 1993]

I. INTRODUCTION

In the above titled action plaintiffs seek monetary damages pursuant to 29 U.S.C. § 216(b)[5] for alleged

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[5]Section 216(b) states in relevant part:

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional

violations of the Fair Labor Standards Act. Specifically, plaintiffs claim that the defendants wrongfully forced them to accept compensatory time in lieu of cash for overtime worked without a mandatory agreement between the public agency and representatives of such employees. *See* 29 U.S.C. § 207(o)(2)(A) (Supp. 1990).[6] Alternatively,

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equal amount as liquidated damages.

29 U.S.C. § 216(b) (1988).

[6]Section 207 states in relevant part:

(o) **Compensatory time**

(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only--

(A) pursuant to--

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of

plaintiffs allege that the defendants have wrongfully denied them the use of accumulated compensatory time. Pending before the court are cross motions for summary judgment.

II. STANDARDS FOR SUMMARY JUDGMENT

A movant is entitled to summary judgment pursuant to Fed.R.Civ.P. 56(c), "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

The moving party bears the burden of proof. *Aetna Life Ins. Co. v. Great National Corp.*, 818 F.2d 19, 20 (8th

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> such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work . . .
>
> .

29 U.S.C. § 207 (Supp. 1990). In Count I, plaintiffs allege that defendants have failed to formally agree with their representative as to compensatory time in violation of subclause (i). Alternatively, plaintiffs allege in Count II that defendants have improperly denied them the benefits of compensatory time accumulated under subclause (ii) agreements.

Cir. 1987). When considering a motion for summary judgment, the court must scrutinize the evidence in the light most favorable to the non-moving party, according the non-moving party the benefit of every factual inference and resolving all doubts as to the facts or existence of any material fact against the moving party. *United States v. Conservation Chem. Co.*, 619 F.Supp. 162, 179-80 (W.D. Mo. 1985).

Recently, the Supreme Court has redefined the standards to be considered in ruling on summary judgment motions. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the Supreme Court stated that "[i]n assessing whether a material fact is subject to a genuine dispute, a court should employ a standard essentially identical to that governing a motion for directed verdict under Rule 50(a)." *Id.* at 250. In *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the Supreme Court emphasized that the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts" in order to establish a genuine issue of fact sufficient to warrant trial. *Id.* at 586. If a rational trier-of-fact, considering the record as a whole, could not find in favor of the non-moving party, then a trial is unnecessary. *Id.*

A) Defendants' Motion for Summary Judgment

Where the party moving for summary judgment does not bear the ultimate burden of persuasion at trial (defendants in this case), that party must make a prima facie showing "that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). This burden is met when the moving party identifies those portions of the

record demonstrating an absence of a genuine issue of material fact. *Id.* at 323.

If the moving party meets this requirement, the burden shifts to the non-moving party (plaintiff in this case) who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248; *see also Matsushita*, 475 U.S. at 586 (setting forth the showing a non-moving party must make in response to a prima facie motion for summary judgment). The trial judge then determines whether a trial is needed. "[W]hether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250.

B) Plaintiff's Motion for Summary Judgment

Plaintiff bears the ultimate burden of persuasion at trial. Therefore, in addition to the burden of making a prima facie motion for summary judgment, plaintiff bears the burden of demonstrating that he would be entitled to a directed verdict despite any controverting evidence presented by defendants. *See Celotex*, 477 U.S. at 331-32 n.3 (1986) (Brennen, J., dissenting). Once the non-moving party has set forth specific facts controverting the movant's prima facie motion for summary judgment, the court must determine whether the moving party, who has the ultimate burden of persuasion at trial, would be entitled to a directed verdict. *See Anderson*, 477 U.S. at 250; *see also U.S. v. One 107.9 A. Parcel of Land In Warren Township*, 898 F.2d 396, 398 (3rd Cir. 1990) (Upon reviewing the plaintiff's motion for summary judgment, the court held that "where the full record, taken together, could not lead a rational trier of fact to find for the non-moving party, no

genuine issue exists for trial"); *U.S. v. O'Connell*, 890 F.2d 563, 566 (1st Cir. 1989) (Applying the directed verdict test stated in *Anderson* where the plaintiff moved for, and was granted, summary judgment).

III. ANALYSIS

A. Count I

Count I is premised on an allegation that defendants violated the Fair Labor Standards Act, specifically 29 U.S.C. § 207(o)(2)(A)(i) (Supp. 1990), by failing to reach an agreement with plaintiffs' representative "regarding the use of compensatory time rather than the payment of overtime wages as compensation for overtime hours worked." Amended Complaint, ¶ 325. In essence, subclause (i) of § 207(o)(2)(A) mandates that a "public agency" (the Department of Corrections in this case) adopting a compensatory time scheme do so exclusively through an "agreement" with the employees' "representative." 29 U.S.C. § 207(o)(2)(A)(i) (Supp. 1990); *see supra* note 2 (for full text of the statute). Subclause (ii), however, provides an exception to the mandate of subclause (i). If the public employees are "not covered by subclause (i)" the public employer may reach individual "comp time" agreements with individual employees. 29 U.S.C. § 207(o)(2)(A)(ii) (Supp. 1990); *see supra* note 2 (for full text of the statute). Therefore, in the event that plaintiffs are "not covered by subclause (i)" Count I fails as a matter of law. It becomes necessary then to define when employees are "not covered by subclause (i)." Fortunately, the recent United States Supreme Court decision in *Moreau v. Klevenhagen*, 113 S.Ct. at 1905 (1993), squarely addresses this issue and ambiguously interprets the phrase "not covered by subclause (i)." This court finds the

decision in *Moreau* dispositive as to Count I and will therefore grant summary judgment in favor of defendants as to this count.

In *Moreau*, the plaintiffs/employees were deputy sheriffs in Harris County, Texas. 113 S.Ct. at 1909. The employees were represented by Moreau, the president of the Harris County Deputy Sheriffs Union. *Id.* Although the Union represented the employees in various capacities, Texas law prohibited it from entering into a collective bargaining agreement with the County on behalf of the employees. *Id.* note 10 (and accompanying text). Therefore, the County entered into individual agreements signed by each employee establishing the conditions of employment, and in particular, the use of compensatory time. *Id.* The employees filed an action alleging that they were "covered" by subclause (i) of § 207(o)(2)(A) "by virtue of their union representation . . ." and therefore the County could only impose a compensatory time scheme via an agreement with the employees' representative. *Id.* at 1909-10. The District Court granted summary judgment in favor of defendants, *Merritt v. Klevenhagen*, No. 88-1298 (S.D. Tex. Sept. 5, 1990), and the Fifth Circuit affirmed, *Moreau v. Klevenhagen*, 956 F.2d 516 (5th Cir. 1992). 113 S.Ct. at 1910.

In affirming the Fifth Circuit, the Supreme Court interpreted subclause (ii) as follows:

> The most plausible reading of the phrase "employees . . . covered by subclause (i)" is . . . [that] the phrase is most sensibly read as referring to employees who have

> designated a representative with the authority to negotiate and agree with their employer on "applicable provisions of a collective bargaining agreement" authorizing the use of comp time. This reading accords significance to both the focus on the word "agreement" in subclause (i) and the focus on "employees" in subclause (ii) . . .

113 S.Ct at 1911-12.[7] After reviewing the statute and the controlling Department of Labor regulations, the Court concluded that "employees are 'covered' by subclause (i) when they designate a representative who lawfully may bargain collectively on their behalf--under the statue, because such authority is necessary to reach the kind of

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[7]This portion of the *Moreau* opinion was directed at arguments very similar to those advanced in this case. Specifically, the plaintiffs in *Moreau* argued that representation alone triggers the application of subclause (i). 113 S.Ct at 1910-12. Thus, even if the representative had no power to strike a binding agreement with the employer, subclause (i) would be operative. Conversely, the *Moreau* defendant argued that only an agreement can activate the requirements of subclause (i). *Id.* at 1910-1911. Therefore, the employer could escape subclause (i) by simply refusing to reach an agreement with the representative. The Court rejected both of these extreme interpretations of the statute and found an "intermediate reading of the statutory text" most plausible. *Id.* at 1912.

'agreement' described in subclause (i) . . . ." *Id.* at 1912. In other words, application of subclause (i) requires a two-part finding: (1) That the employees have a representative; and (2) that this representative and the employer are legally capable of entering into a binding agreement as to compensatory time. Having determined that Texas law precluded the Union from entering into an agreement with the County providing for compensatory time, the Court held that plaintiffs/employees "were 'not covered by subclause (i)' and subclause (ii) authorized the individual agreements challenged in this litigation." *Id.* Should this court conclude that Missouri law precludes a binding agreement between the Department of Corrections and plaintiffs' representative, *Moreau* compels that summary judgment be granted in favor of defendants.[8] Therefore, whether

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[8]*Moreau* is also significant because the Court granted certiorari to resolve a "conflict among the Circuits over the scope of subclause (i)'s coverage . . . ." 113 S.Ct at 1910. In particular, the Court sought to resolve the inconsistencies between the primary authority cited by the parties in this action. In addition to the Fifth Circuit's decision in *Moreau v. Klevenhagen*, 956 F.2d 516 (5th Cir. 1992), the Department of Correction's motion for summary judgment is primarily based on *Abbott v. City of Virginia Beach*, 879 F.2d 132 (4th Cir. 1989), *cert. denied*, 493 U.S. 1051 (1990), and *Dillard v. Harris*, 885 F.2d 1549 (11th Cir. 1989), *cert. denied*, 498 U.S. 878 (1990). Plaintiff's motion for summary judgment is predominantly founded on *International Ass'n of Fire Fighters, Local 2203 v. West Adams County Fire Dist.*, 877 F.2d 814 (10th Cir. 1989), and *Nevada Highway Patrol Ass'n v. Nevada*, 899 F.2d 1549 (9th Cir. 1990). The Supreme Court's decision in *Moreau* expressly eliminates any conflict between these

Missouri law prevents the formation of such a § 207(o)(2)(A)(i) "agreement" becomes the dispositive question.

In answering this question, the court turns first to the Missouri Revised Statutes that provide:

> Whenever such proposals (concerning conditions of employment) are presented by the exclusive bargaining representative to a public body, the public body or its designated representative or representatives shall meet, confer and discuss such proposals relative to . . . condition of employment of the employees of the public body with the labor organization which is the exclusive bargaining representative of its employees in a unit appropriate. Upon the completion of discussions, the results shall be reduced to writing and be presented to the appropriate administrative, legislative or other governing

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decisions and provides this court with clear guidance in handling the issues raised by the motions for summary judgment. *See* 113 S.Ct. at 1910 n.14.

> body in the form of an ordinance, resolution, bill or other form required for adoption, modification or rejection.

Mo.Rev.Stat. § 105.520 (1986) (parenthetical added). In applying § 105.520, Missouri courts have unambiguously found that "public bodies" such as the Department of Corrections lack authority to reach binding agreements with employee representatives. *See Morrow v. City of Kansas City*, 788 S.W.2d 278, 280-81 (Mo. 1990) (en banc) (citing § 105.520 and stating that "[t]his Court has held that a city is not authorized to enter into a binding collective bargaining agreement"); *Sumpter v. City of Moberly*, 645 S.W.2d 359, 361-63 (Mo. 1982) (en banc) (holding that pursuant to § 105.520, the City of Moberly was not authorized to enter into a collective bargaining agreement); *Strunk v. Hahn*, 797 S.W.2d 536, 543 (Mo. Ct. App. 1990) (stating that the Board of Public Utilities of the City of Springfield was unable to enter into a collective bargaining contract); *State v. Kansas City Firefighters Local 42*, 672 S.W.2d 99, 105 (Mo. Ct. App. 1984) ("[P]ublic employees may require the governmental employer to 'meet, confer and discuss' proposals as to terms of employment, but not to agree"); *Null v. City of Grandview*, 669 S.W.2d 78, 80 (Mo. Ct. App. 1984). The discussion provided in *Null* is illuminating.

In *Null*, firefighters filed suit against their employer, the City of Grandview. Plaintiffs claimed that, in alleged violation of § 105.520, Grandview passed an ordinance affecting their pay and employment conditions without reaching an agreement with plaintiffs' collective bargaining representative. 669 S.W.2d at 79-80. In affirming the trial

court's decision in favor of the defendant, the appellate court held that:

> The matter of compensation and conditions of work in public employment is a legislative exercise, and under the doctrine of separation of powers, may not be ceded by delegation or contract . . . Thus, the Public Sector Labor Law (including § 105.520) enables a public body to enact a proposal to which it agrees, but requires no agreement. But even agreement does not consummate into an enforceable collective bargain. Rather, the legislative function remains unimpaired to alter the subject of agreement by a successive ordinance.

Id. at 81 (parenthetical added) (citing *Sumpter v. City of Moberly*, 645 S.W.2d 359, 361-63 (Mo. 1982) (en banc)). This court interprets *Null* and *Sumpter* as holding that public bodies cannot enter into enforceable agreements with employee representatives because "conditions of work in public employment is a legislative exercise . . . ." 645 S.W.2d at 361-63; 669 S.W.2d at 81. The function of § 105.520 is not to yield a binding agreement, but to facilitate

the development of a negotiated understanding which in turn is given effect by legislation.[9]

Therefore, the court concludes that the Department of Corrections lacked authority to enter into a binding agreement establishing conditions of employment for plaintiffs.[10] Section 105.520 merely allows public employees an avenue for participating in the legislative process that forms the conditions of their employment.[11] Having so concluded, the court is compelled by *Moreau* to find that the plaintiffs are "not covered by subclause (i)" of

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[9]The results of the negotiations are reduced to writing and presented to the appropriate governing body "for adoption, modification or rejection." Mo.Rev.Stat. § 105.520 (1986).

[10]In reaching its conclusion in *Moreau*, the Supreme Court relied on the Department of Labor's interpretation of § 207(o) that coverage of the section was to be determined by State and local law. 113 S.Ct. at 1909 (citing 52 Fed. Reg. 2014-2015 (1987)). It is noteworthy that this interpretation by the Department of Labor was "in response to concerns expressed by the State of Missouri about the impact of the regulations in states where employee representatives have no authority to enter into enforceable agreements . . . ." *Id.*

[11]"The meet, confer and discuss schemes of the Public Sector Labor Law (i.e. § 105.520) confirms nothing less than the constitutional right of public employees to peaceably assemble and to petition government for a redress of grievances." *Null*, 669 S.W.2d at 80 (parenthetical added).

§ 207(o)(2)(A). Consequently, Count I fails as a matter of law.

B. Count II

Having found that plaintiffs are employees "not covered by subclause (i)," it follows that defendants could legitimately enter into compensatory time agreements with individual employees pursuant to subclause (ii). Count II (pled alternatively to Count I) assumes validity of these individual agreements but alleges that the defendants have improperly managed the compensatory time scheme. "Specifically, defendants have violated the FLSA by failing to grant employee requests for compensatory time when they could have done so without undue disruption to the agency . . . In addition the defendants have interfered with the right of the employees to preserve their compensatory time, but unilaterally assigning the plaintiffs to utilize compensatory time at times designated by the DOC." Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 12.

Count II is founded upon alleged violations of 29 U.S.C. § 207(o)(5) (Supp. 1990).[12] Section 207(o)(5) grants

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[12]Section 207(o)(5) states:

An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency--

> (A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

an employee the right to designate when he or she will use compensatory time provided that the exercise of this right "does not unduly disrupt the operations of the public agency." 29 U.S.C. § 207(o)(5) (Supp. 1990). The cross motions for summary judgment as to Count II present two issues for resolution: (1) Does § 207 permit defendants to dictate to plaintiffs when they will use compensatory time? And, (2) Have defendants denied plaintiffs' requests for compensatory time in violation of § 207(o)(5)?[13]

(B) who has requested the use of such compensatory time,

shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

29 U.S.C. § 207(o)(5) (Supp. 1990).

[13]Defendants also argue that the Fair Labor Standards Act does not create a cause of action for alleged violations of § 207(o)(5). The court disagrees. In determining whether a statute gives rise to a private cause of action, the court should examine the following factors:

> (1) whether the plaintiffs are members of the class for whose particular benefit the statute was intended; (2) whether the legislature intended to authorized private actions; (3) whether a federal cause of action would further the underlying purpose of the legislative scheme; and (4) whether the asserted private action is one traditionally reserved for state law, such that it would be inappropriate to

1) Dictating Use of Compensatory Time

Plaintiffs allege that "defendants have interfered with the right of the employees to preserve their compensatory time, by unilaterally assigning the plaintiffs to utilize compensatory time at times designated by the DOC." Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 12. Defendants respond, arguing that the Fair Labor Standards Act does not prohibit an employer from dictating when an employee uses compensatory time. Defendants' Suggestions in Opposition to Plaintiff's Motion for Summary Judgment, p. 26. The court agrees that the Act does not expressly preclude an employer from so determining when accrued compensatory time is used. However, granting employers this option would cut severely against the grain of the Act, interpretive regulations and legislative history.

Compensatory time as defined by § 207 is a "right" that employees can "preserve" and dispose of at their discretion.[14] The only limitation on this right recognized by

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infer a federal cause of action.

See Merrell Dow Pharmaceutical, Inc. v. Thompson, 478 U.S. 804, 810-11 (1986); *Cort v. Ash*, 422 U.S. 66, 78 (1975). Having reviewed these factors, the court finds that a private cause of action to enforce § 207(o)(5) is appropriate.

[14]This conclusion is supported first by the language of the statute itself. A literal reading of § 207(o)(5) leaves the strong impression that compensatory time is a "right" exclusively vested in the employee and that his or her

discretion in exercising that right "shall" be respected if at all possible (i.e. unless it would "unduly disrupt the operations"). *See* 29 U.S.C. § 207(o)(5) (Supp. 1990).

Additionally, the regulations promulgated by the Department of Labor to effectuate § 207 support the court's reading of the statute. For example, 29 C.F.R. § 553.25(b) (1992), defines compensatory time earned as a "right." Further, these regulations require an employer reaching a subclause (ii) agreement with an employee to inform the employee "that compensatory time received may be preserved . . . ." 29 C.F.R. § 553.23(c)(2)(ii) (1992). The right to preserve compensatory time would be hollow indeed if the employer could unilaterally dictate when the employee would use compensatory time. Also, the regulations evidence a strong bias toward the employee's freedom to use compensatory time at his or her discretion. An employee's request to use compensatory time "shall be honored unless to do so would be 'unduly disruptive' to the agency's operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off." 29 C.F.R. § 553.25(d) (1992); *see also* S. Rep. No. 99-159, 99th Cong., 1st Sess. 651, 660 (1985). These regulations imply a vested right, the exercise of which cannot be limited except for one narrow reason. Further, the Department of Labor has analogized compensatory time rights to cash earnings from overtime accumulated by an employee in a bank. *See* 51 Fed. Reg. 25710, 25713 (1986). As plaintiffs point out, it would be difficult to justify an employer dictating how an employee chooses to spend overtime earnings.

Finally, the legislative history of § 207 (cited by defendants) defines accumulated compensatory time as a "right" that can only be limited under the "undue

§ 207 is that employees cannot use compensatory time in a fashion that will "unduly disrupt the operation of the public agency." 29 U.S.C. § 207(o)(5)(B) (Supp. 1990). To grant an employer the power to unilaterally decide when employees will be permitted to use compensatory time would serve to severely devalue, if not eliminate, the right to "preserve" and use compensatory time at their discretion. Therefore, the court concludes that, as a matter of law, the defendants do not possess the power under § 207(o) to unilaterally determine when plaintiffs can use accumulated compensatory time.[15] It follows then that plaintiff's motion

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disruption" exception. S. Rep. No. 99-159, 99th Cong., 1st Sess. 651, 660 (1985).

In light of the common theme found in these diverse sources, the court is confident that compensatory time is a right to be "preserved" and exercised at the employee's discretion.

[15]Defendants attempt to argue that § 207(o)(5)'s "undue disruption" standard for denying requested compensatory time can justify "assigning" plaintiff to use accumulated compensatory time. The court is unpersuaded.

Employees have a right to use compensatory time at their discretion. *See supra* note 10. The only intrusion upon this right recognized by § 207 is that the agency can protect itself from undue disruptions by denying compensatory time requests. This "veto power" permits a balance between the right of the employees to exercise a choice in using accumulated time and the needs of the employer. *See* S. Rep. No. 99-159, 99th Cong., 1st Sess. 651, 659 (1985) ("The Committee has sought to balance the employee's right to make use of comp time that has been earned and the employer's need for flexibility in

for summary judgment will be granted as to this portion of Count II.

2) Denials of Requests for Compensatory Time

Finally, plaintiffs allege that defendants have denied requests for compensatory time off in violation of § 207(o)(5)(B). Defendants respond by arguing that the alleged denials of requests for compensatory time off are largely overstated and that any denials were reasonably

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operations") (emphasis added). However, the level of intrusion takes a quantum leap if the employer is granted the affirmative power (as opposed to a "veto power") to unilaterally dictate when compensatory time is used. At that point, no balance exists and the employees' right to discretionary use of compensatory time evaporates. The court cannot reasonably read § 207(o)(5) as allowing a total divestiture of an employee's right to decide when to use his or her compensatory time.

Even assuming, however, that the "undue disruption" exception of § 207(o)(5) does allow an employer to dictate when an employee uses compensatory time does not aid defendants. The ultimate test under § 207(o)(5) is whether the employer's action were reasonable. *See* S. Rep. No. 99-159, 99th Cong., 1st Sess. 651, 660 (1985) (implying that the "undue disruption" standard is to be interpreted within the context of reasonableness). To justify unilaterally mandating when plaintiffs use accumulated compensatory time, defendants must make a strong showing that the extreme intrusiveness of this policy was/is reasonable. Upon reviewing the evidence supplied by defendants in support of this policy, the court cannot conclude that this policy is reasonable within the context of § 207(o)(5).

designed to prevent undue disruption to the operation of the Department of Corrections. Ultimately, the central issue is whether the alleged denials of plaintiffs' requests were reasonable in light of § 207(o)(5).

The court finds that resolution of this issue is particularly well-suited for the trier of fact. A review of the evidence presented by the parties in support of, and opposition to, the cross-motions for summary judgment indicates a substantial dispute as to the central issue of reasonableness under § 207(o)(5). Plaintiffs have presented substantial evidence (in the form of answers to interrogatories and depositions) that could support a finding that denials of requests for compensatory time off were unreasonable under § 207(o)(5). *See* Memorandum in Support of Plaintiff's Motion for Summary Judgment, Plaintiffs' Statement of Uncontroverted Facts, ¶¶ 38-51. Conversely, defendants have presented evidence that could support a conclusion that: (1) The number of actual denials of requests to use compensatory time was very small; and/or (2) any denials of requests to use compensatory time were reasonable in light of the Department of Correction's security needs. *See* Defendants' Suggestions in Support of the Motion for Summary Judgment, Uncontroverted Material Facts, ¶¶ 37, 41, 43-54. Given this dispute, the court is required to deny both motions for summary judgment as to this portion of Count II.

IV. CONCLUSION

Pursuant to the above discussion, it is ORDERED that: (1) Defendants' motion for summary judgment is GRANTED in part and DENIED in part as follows:

(A) Defendants' motion for summary judgment is GRANTED as to all claims stated in Count I; and

(B) Defendants' motion for summary judgment is DENIED as to all claims stated in Count II.

(2) Plaintiffs' motion for summary judgment is GRANTED in part, and DENIED in part as follows:

(A) Plaintiffs' motion for summary judgment is DENIED as to all claims stated in Count I;

(B) Plaintiffs' motion for summary judgment is GRANTED as to all claims stated in Count II concerning defendants' ability to affirmatively mandate when an employee will use accumulated compensatory time (*See* Section III(B)(1) of this Order); and

(C) Plaintiffs' motion for summary judgment is DENIED as to all remaining claims stated in Count II;.

Dated this 8th day of July, 1993

/s/ Fernando J. Gaitan, Jr.
FERNANDO J. GAITAN, JR.
United States District Judge